



Otieno v China Jiangxi International (K) Ltd (Civil Application E038 of 2024) [2025] KECA 533 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 533 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E038 OF 2024
MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA
MARCH 21, 2025**

BETWEEN

MOSES ADERO OTIENO APPLICANT

AND

CHINA JIANGXI INTERNATIONAL (K) LTD RESPONDENT

(Being an application for stay of execution and an order of injunction pending an intended appeal against the Judgment of the High Court of Kenya at Homa Bay (J.R. Karanjah, J.) dated 9th April, 2019 in Civil Appeal No. 14 of 2018)

RULING

1. The applicant, Moses Adero Otieno, has moved this Court by a notice of motion dated 13th February, 2024, brought under Rule 5(2)(b) of the Rules of this Court, seeking the following orders:
 1. Spent
 2. That pending the hearing and determination of the appeal from the judgment of the High Court (Justice J.R. Karanjah) sitting in Homa Bay, delivered on 9th April, 2019, this Honourable Court be pleased to issue an order of stay of execution in Homa Bay High Court Civil Appeal No.14 of 2018 China Jiangxi International (K) Ltd vs. Moses Adero Otieno, and an order of injunction/stay of injunction (sic) restraining the respondent and its employees, agents, servants or hirelings, from executing the judgment and orders in the said HCCA No.14 of 2018.
 3. That the costs of and incidental to this application abide the outcome of the appeal.”
2. The application is premised on grounds that soon after the delivery of judgment by the superior Court, the applicant filed an application for stay of execution before the same court, which application was dismissed vide a ruling dated 16th October, 2019. That thereafter, the applicant filed a similar



application before this Court, which application was struck out on 23rd October, 2020, for want of a copy of the notice of appeal.

3. That the applicant filed a subsequent application for stay of execution being Civil Application No. 30 of 2021 before this Court, but withdrew the same on 7th December, 2023, because he again failed to attach a copy of the memorandum of appeal. The applicant states that he has already filed and served the record of appeal. He urged that his appeal, if successful, will be rendered nugatory, if the orders sought are not granted, as the respondent is a foreign company, and may close shop at any time, and leave the jurisdiction of this Court, even before the appeal is heard and determined.
4. The applicant asserts that his appeal is arguable based on the grounds exhibited in the memorandum of appeal. He urged that the respondent, through its advocates, has taxed its costs in the first appeal before the High Court, and will execute the judgment of the said court, having already taken out a notice to show cause why execution should not proceed.
5. In support of the application, the applicant swore an affidavit dated 13th February, 2024, deposing that by consent of the parties, a sum of Kshs.300,000/= was remitted by the respondent, through his advocates, to the applicant's advocates, who deposited the same in a fixed deposit account pending hearing and determination of the appeal before the High Court. He deposed that the first appellate court having entered judgment in favour of the respondent, the respondent now seeks the release of the said sum, and has filed a bill of costs, which was taxed, and a certificate of costs issued by the taxing officer. He averred that the respondent has also taken out a notice to show cause seeking the execution of the said judgment. He deposed that his appeal, if successful, will be rendered nugatory should the order of injunction craved for is denied, since the respondent, as a foreign company, may probably not be operating within the jurisdiction of this Court. He maintained that the respondent will suffer no prejudice if orders sought are granted. He urged us to allow the application as prayed, and order that the sum of Kshs.300,000/= deposited remain in the fixed deposit account pending hearing and determination of the appeal.
6. The application was unopposed. The respondent did not file any response to the applicants' application.
7. The application was canvassed by way of written submission of the applicant which were orally highlighted. The respondent did file any written submissions. On whether the appeal is arguable, Mr. Odhiambo, learned counsel for the applicant, urged that this Court will have the chance to interrogate whether: the first appellate court properly interpreted the tenancy agreement between the parties; the learned Judge made the correct decision with regard to the applicant's claim for the sum of Kshs.80,000/=, which the applicant spent on repairs of the premises; and whether the learned Judge erred in applying the provisions of the *Civil Procedure Act*, and the *Evidence Act*, in respect of the standard of proof in a civil suit.
8. On the nugatory aspect, counsel urged that the applicant will be prejudiced if the orders sought are not granted, as the respondent will proceed to execute the judgment of the high court, and the applicant will not be in a position to recover the decretal sum, should he succeed in his appeal before this Court. It was his submission that the respondent is a foreign company, and that the applicant does not know where its offices are situated, the respondent having left Mbita/Rusinga after the completion of the construction of Mbita-Rusinga Bridge. He argues that if the respondent left the jurisdiction of the Court, the applicant's appeal will be rendered an academic exercise. He invited us to exercise our discretion, and allow the application as prayed.
9. We have considered the application in light of the sole pleadings of the applicant, the authorities cited and the law.



10. The principles for granting a stay of execution or injunction under Rule 5(2)(b) of this Court's Rules are well settled. In the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR this Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed, an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay, the appeal or intended appeal, if successful, will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
11. For an applicant to benefit from the discretion of this Court, he/she must demonstrate both limbs to the Court's satisfaction. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
12. With regard to the first limb, though the applicant has attached a copy of the memorandum of appeal containing the grounds he intends to rely on to challenge the decision of the superior court; he has however, failed to attach a copy of the said judgment, which he intends to appeal against before this Court, and against which he seeks the orders of injunction. The applicant has not set out the particulars of the case whose judgment is sought to be enjoined on the face of the application. In the absence of this information, we are unable to assess whether the applicant's appeal raises triable issues as alleged. It is our considered view that the applicant has failed to place before us sufficient material on the basis of which we can find that the applicant has an arguable appeal.
13. On whether the appeal, if successful, will be rendered nugatory, this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (supra), observed that the applicable test is whether or not what is sought to be stayed is reversible if stay is not granted, and whether damages will reasonably compensate the aggrieved party. In this case, the respondent, as a condition to stay of the judgment of the trial court which was in favour of the applicant, pending hearing and determination of its appeal before the first appellate court, deposited a sum of Kshs.300,000/= with the applicant's advocate, which sum is held in a fixed deposit account. According to the applicant, the respondent's appeal was allowed by the high court. The applicant's main concern is that if the said sum of Kshs.300,000/= is refunded to the respondent, the respondent being a foreign company, may leave the jurisdiction of this Court, and his appeal will be rendered otiose and an academic exercise.
14. Although it is apparent that the respondent has a judgment in its favour, this Court, in the absence of a copy of the impugned judgment or decree, is not able to satisfy itself whether the orders sought to be enjoined are capable of execution. The applicant asserts that the respondent has already taxed its costs and has made an application to execute against him. This Court has held in many decisions that it's a discretionary jurisdiction that cannot be invoked to stay or enjoin the payment of taxed costs.
15. Further, the applicant's contention that the respondent may leave the jurisdiction of this Court is speculative and without any foundation. No evidence was placed before this Court that such eventuality is within the realm of possibility. It is our view that with respect to the deposited sum as well as the certificate of costs, if the applicant's appeal succeeds, this is a case where he can adequately be compensated in damages as well as costs and further an order for the refund of the taxed costs already paid to the respondent.



16. The application fails as he has not been able to demonstrate arguability of his intended appeal, or that his appeal will be rendered nugatory if the order of injunction sought is not granted. The applicants' notice of motion dated 13th February, 2024, lacks merit and is hereby dismissed. There will be no orders as to costs.

17. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

